Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

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April 23, 2004

The Honorable Paul E. Gilmor
Chairman
House Subcommittee on Environment and Hazardous Materials
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Hilda L. Solis
Ranking Minority Member
House Subcommittee on Environment and Hazardous Materials
House Committee on Energy and Commerce
2322 Rayburn House Office Building
Washington, DC 20515

Dear Representatives Gilmor and Solis:

The purpose of this letter is to make a brief statement for the record of the views of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) regarding the most recent Department of Defense (DoD) recommendations for amendment of the Resource Conservation Recovery Act (RCRA) and the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA) in conjunction with DoD's Range Readiness Preservation Initiative (RRPI).

ASTSWMO is a non-profit, non-partisan association of State regulators who implement the federal and State hazardous and solid waste laws, the remediation of contaminated waste sites, and the regulation and cleanup of underground storage tanks. Our members are trained in the necessary sciences and public policy procedures to carry out these responsibilities, and bring special expertise to these issues. All States have experience in working with regulation and cleanup on federal facilities, including those of DoD, to include active, closed and closing bases and facilities. Using that experience and expertise, our members have carefully reviewed the 2004 version of DoD's RRPI as it recommends changes to both RCRA and CERCLA and strongly recommend that the Congress not enact these changes into law. Over the past two years, we have voiced similar views, and in an effort not to repeat those more extensive objections, we would like to summarize along four major themes:

1. The DoD recommendations are inconsistent with actual regulatory experience. No one has identified an empirical case where regulators have actually adversely affected

readiness training at active military ranges using RCRA or CERCLA authorities as the basis of action. DoD is unable to provide us with an example of regulatory excess that has affected its use of active ranges. Our State regulators recognize that these necessary military range activities follow established safety patterns for the intended use of ammunition and other explosive devices, and have consistently worked with military facility leadership to find ways to ensure the environmental safety of civilian communities in proximity of the ranges. It is our experience that our members' primary day-to-day professional interest is in the cleanup or planned cleanup of closed and closing ranges, rather than the active ranges. They are prepared to intervene on active ranges if that is necessary for protection of human health and the environment, but their working regulatory relationships with the facilities allow resolution of such issues before those reach significance or threaten any disruption of training. DoD may have experienced occasional challenges from citizen groups alleging some serious violation of RCRA or CERCLA, but not from regulators. Because regulators and citizens have different responsibilities in the RCRA and CERCLA processes, it is essential that DoD's recommended modifications be examined in light of those differences.

2. The proposals represent an imprudent reduction of current regulatory authority that protects human health and the environment. The DoD legislative proposals would strip State regulators of their ability to address the source of contamination if it originated from an operational range (as defined in federal law) unless and until the contamination migrated from the range. Because the proposed language would exempt military munitions (including unexploded ordnance) on an operational range, as well as " the constituents thereof", the chemicals that are constituents of the ordnance would be exempt, regardless of their impact on the groundwater system, until the contamination physically migrates off the operational range. Under the definition of an operational range adopted as a statutory provision last year that can be a very large area of land, sea or airspace. We consider a statutory outcome that would so limit State regulators to be unwise, because it strikes at the basic preventative purpose of RCRA. The suggestion that this loss of RCRA authority would be offset because EPA would retain authority under CERCLA to act in case of imminent and substantial endangerment, or that authorities of the Safe Drinking Water Act (SDWA) are maintained, is not convincing. Within the Administration, EPA must clear any such CERCLA orders with the Department of Justice before acting, and to our knowledge has never done so in such a situation. As we understand it, the SDWA is designed to protect the quality of the nation's drinking water, and is not specifically designed as a cleanup statute. RCRA was designed to meet such contingencies, and we consider it imprudent to tie the hands of regulators with responsibility for protection of human health by limiting the jurisdiction of this statute, as it would apply to operational ranges.

3. The proposed language is deeply flawed. Despite DoD's assertion that they have written exemptions that would only apply to their activities, State environmental attorneys have not agreed, believing that the exemptions could adversely affect cleanups at closed ranges, limit existing waivers of sovereign immunity, and even be argued to extend beyond DoD and the military services in application. Although our members focus on

implementation of waste and remediation regulatory activities and do not claim any special expertise in such subtleties of law, we have no desire to have our work disrupted by unnecessary legal challenges as a result of inadequate drafting. We believe that DoD's approach in seeking changes to the fundamental definitions of RCRA and CERCLA is mistaken. The broad scope of their proposal goes far beyond their stated goals of finding relief from specific range readiness situations. Further, DoD seeks these extraordinary exemptions without efforts to offset the additional dangers of contamination that would result from such exemptions. For example, they propose no statutory monitoring or corrective action obligations in these recommendations, so they constitute little more than a license to pollute without conditions or consequences unless and until the contamination migrates off-range. We do not believe DoD needs these exemptions in any case, so we are not suggesting that their proposals be rewritten to make them more acceptable. We simply wish to illustrate some inherent weaknesses in their recommendations. We would encourage members of Congress to closely examine the detailed analysis provided by State attorneys general in conjunction with this hearing in order to access the full range of legal issues that concern our members.

4. The proposed amendments to RCRA and CERCLA are unnecessary. Existing mechanisms in both RCRA and CERCLA allow the President to exempt a specific installation from the applicable environmental law in the "paramount interest of the United States". That flexible authority is certainly adequate to address the cumulative impact of environmental requirements on military readiness, and while DoD has complained in the past of the administrative difficulty of using these existing exemptions, the Administration alone is responsible for the procedures and can streamline them as it wishes.

We recognize the importance of live range firing and training activities to the combat readiness of our Armed Forces, and their readiness and safety are important to us as Americans. We accept the judgment of the DoD military experts about what training is necessary to reach those levels of combat readiness, and are prepared to continue to work with them as we have in the past to ensure that such essential training can take place. We recognize that DoD faces challenges in retaining adequate training facilities in a nation with ever expanding growth patterns, but we are confident that State governments are prepared to work with them to continue to find solutions that meet the basic needs of all concerned.

DoD has spent time talking with States and their organizations, including ours, about range issues and we are appreciative of those discussions. DoD's proposed amendments reflect some evolution over the past two years, but unfortunately not in the essential areas of a justification for such changes, recognition of State regulatory responsibilities for human health of its citizens, or of the possible consequences of inappropriate legislative content. While we appreciate their efforts at outreach, we must still report that we do not agree with their evaluation of the legal situation or with their proposed solutions. DoD simply has not made a case for such changes, or for the content of their recommended amendments.

We do see future hazards to our ground water resources, a primary pathway to human receptors, and to expanded federal financial liability if these exemptions were to be adopted and implemented. Consequently, we urge the Congress to again reject DoD's recommended changes to RCRA and CERCLA as unsupportable and potentially dangerous to both the physical and financial health of the country. Thank you for your attention to our views.

Sincerely,

Jay Ringenberg

Jay Ringenberg
ASTSWMO President

cc: The Honorable Joe Barton, Chairman, House Energy and Commerce Committee
The Honorable John Dingell, Ranking Minority Member, House Energy and Commerce Committee